

Before the  
Administrative Hearing Commission  
State of Missouri



ANDREW GRIZZARD,

Petitioner,

v.

DIRECTOR OF DEPARTMENT  
OF INSURANCE, FINANCIAL  
INSTITUTIONS AND PROFESSIONAL  
REGISTRATION,

Respondent.

No. 14-0524 DI

**DECISION**

We grant in part the motion for summary decision filed by the Director of the Department of Insurance, Financial Institutions and Professional Registration (“the Director”). The Director has cause under § 375.141.1(2) and (9) to deny Andrew Grizzard’s application to add an additional line of authority to his non-resident insurance producer license.

**Procedure**

Grizzard filed a complaint on April 26, 2014, appealing the Director’s decision to refuse to add another line of authority to Grizzard’s existing non-resident insurance producer license. The Director filed an answer on May 30, 2014.

The Director filed a motion for summary decision on October 3, 2014. Grizzard filed a response to the motion on October 18, 2014. The Director then requested leave to file a reply to Grizzard’s response by October 29, 2014, which we granted.

On October 29, 2014, the Director filed his response and a motion to continue the hearing presently scheduled for November 18, 2014. We deny the Director's motion to continue.

We base our findings of fact on the authenticated business records of the Department of Insurance, Financial Institutions and Professional Registration ("the Department") attached to the Director's motion, as well as Grizzard's response to the motion, which includes an unauthenticated copy of a stipulation he entered into with the Colorado Division of Insurance. The Director objects to our considering the latter as self-serving, irrelevant hearsay. To the contrary, we find it is both relevant and, given the statutory causes for discipline at issue in this case, an admission by Grizzard against his interest. *See United Missouri Bank, N.A. v. City of Grandview*, 179 S.W.3d 362, 371 (Mo. App. W.D., 2005) (an admission against interest must be a conscious acknowledgment of certain facts, relevant to the party's cause, and unfavorable to or inconsistent with the party-opponent's position). Hence, we consider the stipulation submitted by Grizzard as well as the Director's evidence.

### **Findings of Fact**

1. On August 17, 2012, the Department issued Grizzard a non-resident insurance producer license for accident and health sales ("the existing license").
2. On July 22, 2013, the Department received Grizzard's electronic "Uniform Application for Individual Producer License/Registration" ("the application") to add the life line of authority to his existing license.

3. The application contains an attestation section stating:

I hereby certify that, under penalty of perjury, that all of the information submitted in this application and attachments is true and complete. I am aware that submitting false information or omitting pertinent or material information in connection with this application is grounds for license revocation or denial of the license and may subject me to civil or criminal penalties.

*Exhibit 1A.* Grizzard marked a box indicating that he accepted the attestation.

4. The application contains the following background question:

Have you ever been named or involved as a party in an administrative proceeding including FINRA sanction or arbitration proceeding regarding any professional or occupational license or registration?

*Id.* Grizzard marked “no” in response to this question.

5. In the course of considering the application, the Department investigated Grizzard and discovered two administrative proceedings against Grizzard in other states that he had failed to disclose on his application.

6. Specifically, on September 24, 2012, the Colorado Division of Insurance denied Grizzard’s application for licensure as a non-resident insurance producer with accident and health authority. That action (“the Colorado denial”) became final on November 23, 2012.

7. On November 19, 2013, Grizzard and the Colorado Division of Insurance entered into a Stipulation for Entry of Final Agency Order (“the Colorado order”) in which the Division agreed to issue him a producer license with life, accident, and health authority. In the Colorado order, Grizzard admitted that he sold two policies to Colorado customers while he was not licensed in Colorado, but contended he was unaware that he was not properly licensed to sell the policies or that his actions were illegal.

8. On February 27, 2013, the Kentucky Department of Insurance entered an order of revocation against Grizzard. That action (“the Kentucky revocation”) became final on April 29, 2013.

9. Grizzard reported neither the Colorado denial nor the Kentucky revocation to the Department within thirty days of their final disposition.

10. The Director issued an order denying Grizzard’s application on April 3, 2014.

11. On April 28, 2014, the South Dakota Division of Insurance entered into a consent order with Grizzard, fining him \$500.00.

## **Conclusions of Law**

We have jurisdiction to decide this matter. Sections 374.051.1 and 621.045.<sup>1</sup> We may grant a motion for summary decision if a party establishes facts that entitle that party to a favorable decision and no party genuinely disputes such facts. 1 CSR 15-3.446(6)(A).<sup>2</sup> Facts must be established by admissible evidence such as affidavits or the adverse party's pleading or discovery response. 1 CSR 15-3.446(6)(B).

In his answer, the Director alleges there is cause to deny Grizzard's application under § 375.141.1(1), (2), (3), (8), and (9). The motion, however, cites only the following:

1. The director [of the Department of Insurance, Financial Institutions and Professional Registration] may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:...

(2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;

\* \* \*

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere;

(9) Having an insurance producer license, or its equivalent, denied, suspended or revoked in any other state, province, district or territory[.]

\* \* \*

6. An insurance producer shall report to the director any administrative action taken against the producer in another jurisdiction or by another governmental agency in this state within thirty days of the final disposition of the matter. This report shall

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<sup>1</sup> Statutory references are to the RSMo Supp. 2013 unless otherwise specified.

<sup>2</sup> All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

include a copy of the order, consent order or other relevant documents.

Violation of Insurance Laws -- § 375.141.1(2)

Section 375.141.1(2) provides for discipline when a licensee violates insurance laws. Grizzard did not report the Colorado denial or the Kentucky revocation to the Director within 30 days of when those administrative actions became final. Nor did he ever provide the Director with a copy of the orders or other legal documents. Therefore, he violated § 375.141.6, and there is cause to deny Grizzard's application under § 375.141.1(2).

The Director also argues that he has cause to deny Grizzard's application under this section because Grizzard violated the insurance laws of Colorado, Kentucky, and South Dakota, as established by the certified copies of those states' administrative orders attached to the Director's motion. In other words, the Director asks us to apply the doctrine of collateral estoppel to those orders, although he does not explicitly invoke that doctrine.

Collateral estoppel "is used to preclude the relitigation of an issue that already has been decided in a different cause of action." *Brown v. Carnahan*, 370 S.W.3d 637, 658 (Mo. banc 2012) (citation omitted). For collateral estoppel to apply, the Director must establish four factors in his favor:

- that the issues involved in the prior adjudication and the present action are the same;
- that the prior judgment was on the merits and is final;
- that the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and

- that the party had a full and fair opportunity in the prior adjudication to litigate the issue for which collateral estoppel is asserted.

*Id.* at 659.

Based on the record before us, we cannot determine that Grizzard violated the laws of either Kentucky or South Dakota. The Kentucky order contains no findings of fact that Grizzard failed to obey any Kentucky law. The South Dakota order contains allegations against Grizzard, but no facts. Hence, the evidence about Grizzard's conduct from those two states does not establish the factors necessary for collateral estoppel.

However, the record does establish that Grizzard violated a Colorado insurance law when he sold insurance to two Colorado residents while he was not licensed in that state. Grizzard was a party to the Colorado proceeding; the issue is identical to one in this case; the Colorado revocation order became final; and Grizzard had an opportunity for a hearing on the denial order before it became final. In addition, Grizzard admitted that he violated Colorado law. Such a violation is additional cause for denial under § 375.141.1(2).

Incompetence in the Conduct of Business -- § 375.141.1(8)

The Director argues there is cause to deny Grizzard's application under § 375.141.1(8) because he demonstrated incompetence in the conduct of business when he sold insurance policies to two Colorado residents while he lacked the requisite license to do so.

"Incompetent, if used in a statute relating to actual occupational ability, means "the actual ability of a person to perform in that occupation." Section 1.020(9). Missouri cases have also defined incompetency, in the professional licensing context, as a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation. *Tendai v. Missouri State Bd. of Reg'n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005). Incompetency is a "state of being" showing that a professional is unable or

unwilling to function properly in the profession. *Albanna v. State Bd. of Regis'n for the Healing Art*, 293 S.W.3d 423, 436 (Mo. banc 2009).

All of these authorities imply that in order to make a finding of incompetence, we must engage in a “broader-scale analysis, one taking into account the licensee’s capacities and successes.” *Id.* Grizzard’s unlicensed sale of insurance to two Colorado residents flowed from one fact situation. We do not find that the episode establishes that he demonstrated incompetence in the conduct of business. At this time, the Director has not established cause to deny his application under § 375.141.1(8).

Denial or Revocation by Another State -- § 375.141.1(9)

The Colorado Division of Insurance denied Grizzard’s application for licensure as a non-resident insurance producer with authority to sell accident and health insurance, although a year later it apparently granted his application. The Kentucky Department of Insurance revoked Grizzard’s non-resident insurance agent license. There is cause to deny Grizzard’s application under § 375.141.1(9).

Our lack of discretion -- § 374.051.1

In many applicant cases, the appeal vests in this Commission the same degree of discretion as the licensing agency, and we need not exercise it in the same way. *State Bd. of Regis'n for the Healing Arts v. Trueblood*, 324 S.W.3d 259, 264-67 (Mo. App. W.D., 2012). But § 374.051.1 states:

Any applicant refused a license or the renewal of a license by order of the director under sections 374.755, 374.787, and 375.141 may file a petition with the administrative hearing commission alleging that the director has refused the license. The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in determining whether the applicant may be disqualified by statute. **Notwithstanding section 621.120, the director shall retain discretion in refusing a license or renewal and such discretion shall not transfer to the administrative hearing commission.**

(Emphasis added). Under this provision, we have no discretion when there is any cause to refuse to issue a license. Grizzard argues that he is 71 years old and has never harmed any insured in any state, and that even in Colorado, “where all this began,” he was a victim of circumstances and that state eventually issued him a non-resident license. He also states that he was not aware of the requirement that he report the Colorado action to Missouri, and that even though “ignorance is not excuse . . . it’s better than intent.” *Grizzard’s Reply to Director’s Motion*. Grizzard’s intent is not a factor in the statutory causes for denial we have considered in this order. His argument goes, therefore, to the Director’s discretion on whether to grant Grizzard’s application.

We have found that the Director has cause to deny Grizzard’s application under § 375.141.1(2) and (9). As we have no discretion in this matter, this finding is sufficient to uphold the Director’s decision.

### **Summary**

We grant the Director’s motion for summary decision in part. The Director has cause to deny Grizzard’s application under § 375.141.1(2) and (9). The Director has not shown cause to refuse under § 375.141.1(8) or the other statutes included in his answer; however, because we must defer to the Director’s decision in this matter, any showing of cause for denial is sufficient to uphold the Director’s decision. We cancel the hearing.

SO ORDERED on November 4, 2014.

*\s\ Karen A. Winn*

KAREN A. WINN  
Commissioner